CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 202

Heard at Montreal, Tuesday, March 1Oth, 1970

Concerning

CANADIAN NATlONAL RAILWAYS

and

BROTHERHOOD OF RAlLWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim by former Reservation Clerk, Allan Wayne Wells, Port aux Basques, Newfoundland, for reinstatement in the service of the Company with full rights and loss of Wages.

JOINT STATEMENT OF ISSUE:

On June 14, 1969 Reservation Clerk Allan Wayne Wells and another C.N. employee were apprehended while attempting to remove from C.N. premises at Port aux Basques a television set which was in the course of carriage from Truro, Nova Scotia, to St. John's, Newfoundland. Mr. Wells was charged with attempted theft of which charge he was convicted on August 26, 1969. He was discharged from the Company's service on August 27, 1969.

The Brotherhood claims that the time limits in Article 9.2 were not adhered to and the decision to discharge Allan Wayne Wells was not warranted and requested Mr. Wells' reinstatement with full rights and all loss of Wages.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) E. E. THOMS GENERAL CHAIRMAN	(SGD.) K. L. CRUMP ASSISTANT VICE-PRESIDENT - LABOUR RELATIONS

There appeared on behalf of the Company:

P. A. McDiarmid	System Labour Relations Officer, C.N.R. Montreal
H. Peet	Employee Relations Supervisor, Newfoundland Area, C.N.R
E. Ronayne	Assistant Operations Manager, Newfoundland Area, C.N.R
John Law	Special Agent, C.N. lnvestigation Dept., Newfoundland

And on behalf of the Brotherhood:

E. E. Thoms	General Chairman, B.R.A.C., Freshwater, P.B. Nfld.
G. W. Parsons	Local Chairman, B.R.A.C., Port aux Basques, Nfld.

AWARD OF THE ARBITRATOR

At approximately 0400 hours on June 14, 1969, the grievor was apprehended while he was attempting, together with another employee, to remove certain property from the company's freight shed at Port aux Basques. The property in question was a television set in its original carton and in the course of carriage from Truro, Nova Scotia, to St. John's, Newfoundland. While the union, in its presentation of the case, suggested that the grievor might simply have been the victim of circumstances, who had innocently agreed to help out a fellow employee, and to transport a parcel for him in his car, this characterization of the events, is, in the circumstances, an unlikely one, and is contradicted by the grievor's own statement made on the night in question, and which makes it clear that he knew what he was about. Subsequently, on August 26, 1969, the grievor was convicted in Magistrates Court of attempted theft, and a suspended sentence imposed. I have no doubt that the grievor committed an offence against the company for which discipline might be imposed, and that, in the circumstances, the company would be entitled to discharge the grievor. The questions which arise in this case, however, relate to the procedures followed by the company in investigating the matter and imposing discipline.

Article 9.2 of the collective agreement provides as follows:

> "9.2 Investigations in connection with alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three days). He will be given at least one day's notice in writing of the investigation and of the charges against him. This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one or two fellow employees, or accredited representatives of the Brotherhood, at the investigation. Upon request, the employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within twenty-eight calendar days from the date the statement is taken from the employee being investigated. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissible offence."

The first step taken by the company was to take a statement from the grievor, at about 0100 hours on June 14. It is not suggested that there was anything improper in this. No discipline could be imposed on the grievor without an investigation, and it is clear that the

word "investigation" is used in Article 9.2 to refer to a hearing of which the grievor has notice. That sort of "investigation" however does not prevent the company from carrying out its own enquiry, as article 9.2 makes clear. Article 9.2 does not impose a specific time limit within which the investigation (or hearing) must be held; the requiremnt is simply that it be held "as quickly as possible". An employee may not be held out of service pending investigation for more than three days. Once the investigation has been held, then an employee may only be held out of service, pending the rendering of a decision, in the case of a dismissable offence.

On June 16, the grievor was advised that he was being held out service. On June 17, he left Port aux Basques, apparently to go to Toronto. He did not receive permission from his supervisor for any absence from work. He did however, discuss the necessity of his presence in the area with a specific agent of the company's investigation department, Mr. Law. Mr. Law advised him that the matter was being investigated, that a summons would be issued, and that it would be necessary for the grievor to appear in court at a date to be set by the court. It seems the grievor told Mr. Law that he intended to go to Toronto and Mr. Law told him, in effect, that there was nothing to prevent that. This of course was quite proper. The grievor had not been arrested or summonsed, and was free to go wherever he pleased. Mr. Law was not concerned with the grievor's responsibility to report for work, and clearly had no authority to grant or refuse a leave of absence. The grievor did leave, and did not return until approximately July 2. He did not report to the company. On July 16, at a regular meeting between the company and the union a question was raised as to the grievor's reinstatement. The company, surprised to learn that the grievor had returned, arranged for the investigation (or hearing) contemplated by article 9.2 to take place on July 18, and asked the union to notify the grievor and have him present. No written notice was given as required by article 9.2. The union, however, did not take objection to this procedure, but did notify the grievor and he was present at the time arranged. In these circumstances the union must be taken to have waived strict compliance with the requirements of article 9.2. The grievor was not prejudiced in this regard, for he did have actual notice, and did attend the hearing. If objection had been taken at the time, the company would then have had the opportunity to issue a written notice The situation is analogous to that where a company accepts and answers a grievance without objection, even though the grievance is filed after the time limits set out in the agreement. Depending on the circumstances, the company will be considered to have waived strict compliance with the time limits, and will not be allowed to raise the objection at a later date. Evidence was led at the hearing of this matter as to what was said at this meeting, and it is clear that while the union did not expressly agree to any waiver of compliance with the requirement that notice be in writing, it raised no objection, and in all of the circumstances it is my view that it cannot rely on that objection now. It should be added that there is no substantial difference in the parties' evidence on this matter, and no question of the sincerity and truthfulness of either Mr. Parsons or Mr. Ronayne.

The "investigation" held on July 18 was rather perfunctory, and seems chiefly to establish that the grievor was awaiting a hearing by the

court of the charges against him. He did acknowledge giving his earlier statement to the company police. On the same day the grievor was advised that he was being held out of service "pending the result of an investigation" into the matter, and that he would be advised as to when he would be required to report to give a further statement. This was a dismissible offence, and it was proper for the company to hold the grievor out of service. It was also proper for the company to require more than one hearing, as was held in Case No. 168. lt would not be proper, however, for the company to deprive an employee of his livelihood for a protracted period simply because of its own delay in competing an investigation. In this regard, the facts in this case are different from those in Case No. 168. It may also be observed that the collective agreement in that case called for decision "within fifteen days from the date investigation is held", whereas in the instant case the collective agreement requires the decision to be rendered within twenty-eight days "from the date the statement is taken from the employee being investigated". That date was July 18.

It is understandable that the company would want to wait until the verdict of the court before making its own determination of the matter, but in my view the collective agreement, by calling for a decision within twenty-eight days of his statement, imposes at the least a limit as to the length of time an employee (however serious his offence) may be allowed to wait out of service, uncertain of his future and the disposition of his case. I do not read article 9.2, however, as preventing the company from assessing any discipline after the expiry of the twenty-eight days; the proper interpretation of that provision, in my view, is that the company then loses its right to hold the employee out of service, and must reimburse him for his loss of earnings from that point.

The grievor's trial was held on August 26, 1969, when he was convicted and sentenced. He was called to a further investigation by the company the next day, August 27. At that investigation, it was simply recorded that the grievor had been convicted of attempted theft, with respect to the incident of June 14. The company took the position that it was entitled to hold the grievor out of service pending its decision after this investigation, but in my view the time for decision had already expired, on the twenty-eighth day after the first statement, that is, August 15. On September 23, the grievor was notified of his discharge. I have indicated my conclusion that the company was, in the circumstances, entitled to discharge the grievor (it should perhaps be added that he had relatively little seniority). I do not, therefore, make any award of reinstatement. The grievor was, however, improperly held out of service after August 15, 1969, until the time he was advised of his discharge. The notice of discharge was stated to be "effective 27 August 1969", but the notice was not issued until September 23. The mere stating of an "effective date", of course cannot affect the relief to which the grievor was entitled. the facts of this case, the grievor was improperly held out of service from August 16 to September 23, inclusive. Although he is not entitled to be reinstated, he is entitled to compensation for loss of regular earnings during that period, subject to the deduction of his actual earnings therein, and I so award.

J. F. W. WEATHERILL
ARBITRATOR